UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

JEFFERIES, LLC, Plaintiff	§ § §	
v.	§ §	Civil Action No. 3:17-CV-0332-D
WTW INVESTMENT COMPANY, LTD., ET AL Defendants	§ § §	

DEFENDANTS' RESPONSE TO JEFFERIES LLC'S
CROSS-MOTION FOR SUMMARY JUDGMENT

COME NOW WTW Investment Company, Ltd, Paula Knox, as trustee of the Turnbull Marital Trust, William Stanton, Janet Stanton, Jeffrey L. Dworkin, Robert A. Anderson, John J. Gonzalez, Alejandro Cabrera, Kenneth Barnett, Mark A. Hajda, Brooks Barkley, Sarah Barkley, Andrew Williams, Richard Hoedebecke, Sally S. Hoedebecke, Beth Erwin, Brian Beck, Steven Riebel, as trustee of the Riebel Living Trust, Jennie D. Price, Renouard Investments, LLC, Paul Thompson, David N. Pederson, Todd R. Brown, Jeffrey Miller, Michael Sullivan, Lori Bowen, Phyllis K. Clark, Richard Longoria, Mark E. Trivette, Tarak Patel, Joseph N. Feghali, Robert S. Tyler, Donnella Tyler, Maroon Feghali, Elie N. Feghali, Thomas Keyser, Constance Lindsey, and Rusty McDowell (collectively referred to as “Claimants” or "Defendants"), by their attorneys, McCathern, PLLC, file their Response to Jefferies LLC's Cross-Motion for Summary Judgment, and would respectfully show the Court as follows:

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I.

SUMMARY OF THE RESPONSE

1. Jefferies contends Arbitration is not mandatory for two reasons. It contends claimants are not "customers" under the Financial Industry Regulatory Authority's ("FINRA") mandatory arbitration rule and that public policy is contrary to mandating arbitration in the absence of an arbitration agreement.

2. Without repeating their argument in their Motion for Summary Judgment, Claimants have multiple additional reasons for why the FINRA arbitration rule mandates arbitration:

a. Jefferies's public policy argument is inapplicable because an arbitration agreement exists;

b. Even if an arbitration agreement did not exist, Jefferies's public policy argument is contrary to the great weight of the United States legislation and judicial precedent for at least 60 years;

c. FINRA's arbitration rule is based on Congressional authority, approved by the Securities and Exchange Commission, and serves the legitimate Congressional interests;

d. Jefferies's cited authority regarding the definition of "customer" under the FINRA mandatory arbitration rule is not authoritative. In fact, ***none of the opinions Jefferies cites considered the express rejection by the U.S. Securities Exchange Commission ("SEC") and the vast body of U.S. Constitutional law granting strong deference to agencies of the Executive branch when interpreting their own rules enacted pursuant to Congressionally delegated authority;***

e. Even if Jefferies's cited authority operated as Jefferies contends, arbitration is still mandatory because claimants meet Jefferies argued definition; and

f. Although no direct customer relationship is required, the substantive laws Claimants sue under, formally recognize a direct relationship between Jefferies and Claimants.

II.

JEFFERIES'S PUBLIC POLICY ARGUMENT IS INAPPLICABLE BECAUSE AN ARBITRATION AGREEMENT EXISTS

3. In Jefferies LLC's Response and Brief in Opposition to Defendants' Motion for Summary Judgment and in Support of its Cross-Motion for Summary Judgment ("Jefferies's brief") (Doc. No. 18) it argues that construing the FINRA arbitration Rule to mandate arbitration would be contrary to public policy. *See* Jefferies's brief at 14. Jefferies contends that "compelling arbitration in the absence of a valid agreement would discourage entities from agreeing to arbitrate at all out of fear that such agreements would be stretched too far in the course of judicial construction." This in itself would undermine the federal policy favoring arbitration. *Id.* at 15 (internal quotations omitted).

4. A valid arbitration agreement exists, however. Jefferies is bound by its membership agreement with FINRA to be bound by FINRA's rules, including its arbitration rule. Jefferies does not dispute it has agreed to be bound by FINRA's arbitration rule, nor does Jefferies contend its agreement with FINRA is invalid. Therefore, the issue before this Court is whether FINRA's arbitration rule requires Jefferies to arbitrate Claimants' claims.

III.

JEFFERIES'S PUBLIC POLICY ARGUMENT IS CONTRARY TO THE GREAT WEIGHT OF UNITED STATES LAW

5. Jefferies had to concede that the laws of the United States formally recognize a policy in favor of arbitration. *See* Jefferies's brief at 14 ("the federal policy in favor of arbitration is a matter of black letter law"). However, Jefferies contends that because its agreement to arbitrate is with FINRA and not Claimants, it would be contrary to public policy to compel arbitration. In addition to the many reasons set out below, which also show the policy interests in favor of arbitration in this specific case, the laws of the United States are replete with circumstances where administrative venues are mandatory in the absence of an arbitration agreement. For example, under Title VII and agency regulations, disputes between employees and employers arising from alleged discriminatory employment practices must be brought before the U.S. Equal Employment Opportunity Commission ("EEOC"). *See* 29 C.F.R. § 1614.102. Controversies between tax payers and the Internal Revenue Service ("IRS") must be brought before administrative tribunals. *See* 26 U.S.C. § 7433.

6. A valid arbitration agreement exists for Jefferies, but even if it did not, FINRA's arbitration rule is in good company among other statutes and regulations mandating administrative venues for dispute resolution.

IV.

FINRA'S ARBITRATION RULE IS BASED ON CONGRESSIONAL AUTHORITY, APPROVED BY THE SECURITIES AND EXCHANGE COMMISSION, AND SERVES THE LEGITIMATE INTERESTS OF CONGRESS

7. A brief recitation of FINRA's legal authority will help color the Court's context in determining this issue. FINRA is a "self-regulatory organization" authorized by the Securities Exchange Act of 1934. *See* 15 U.S.C. § 78c (definition of self-regulatory organization). Congress also created the SEC through the Securities Exchange Act of 1934. *See* 15 U.S.C. § 78d(a) ("There is hereby established a Securities and Exchange Commission"). In so doing, Congress delegated the authority to approve the existence and function of self-regulatory organizations to the SEC. *See* 15 U.S.C. § 78s (entitled "Registration, responsibilities, and oversight of self-regulatory organizations"). The SEC is also delegated authority to approve or reject all rules proposed by self-regulatory organizations. *See* 15 U.S.C. § 78s(b).

8. Pursuant to its congressionally delegated authority, the SEC has approved the existence and function of FINRA to regulate the business activities of its member firms and promote "high standards of commercial honor." *See* Defendants' Original Answer and Motion for Summary Judgment (Doc. No. 10) at 7 for recitation of FINRA's formal mission. FINRA took over this role for its predecessor, the National Association of Securities Dealers ("NASD").

9. Furthermore, pursuant to its congressionally delegated authority, the SEC has also reviewed and approved FINRA's arbitration rule. In fact, the SEC has even interpreted the very issue Jefferies raises in this suit, discussed fully below.

10. Jefferies cannot dispute that Congress has the power to regulate its business activities. Nor can Jefferies dispute that promoting fair trade and investor protection are legitimate governmental interests. Congress and President Roosevelt enacted the Securities

Exchange of 1934 citing a need "to insure the maintenance of fair and honest markets." *See* 15 U.S.C. 78b (entitled "Necessity for regulation"). Enforcing FINRA's rules and applying other laws governing the business activities of Jefferies are squarely within the delegated authority of the SEC and therefore FINRA. In approving FINRA's arbitration Rule, the SEC was acting soundly within its congressionally delegated authority in furtherance of the governmental interest to insure the maintenance of fair and honest markets. The judiciary has also recognized as much.

11. Because of the SEC's oversight, FINRA Rules approved by the SEC are expressions of federal legislative power and have the force and effect of a federal regulation. *Karsner v. Lothian*, 532 F.3d 876, 880 (D.C.Cir.2008) ("FINRA, as NASD's successor, is 'the only officially registered 'national securities association' under [the Exchange Act].'") (internal citation omitted). FINRA has regulatory power, delegated from Congress through the SEC in the Securities Exchange Act of 1934, over broker-dealer firms registered pursuant to section 15 of the Exchange Act and their registered associated persons. The Securities Exchange Act of 1934 gives FINRA the power to propose rules for the conduct and governance of its regulatory functions, and also regulates those rules. As a self-regulatory organization, FINRA is a key part of the interrelated and comprehensive mechanism for regulating securities markets, including market participants such as Plaintiff. *See, e.g., Desiderio v. Nat'l Ass'n of Sec. Dealers, Inc.*, 191 F.3d 198, 201 (2d Cir.1999) ("As an integral part of a comprehensive system of federal regulation of the securities industry, the NASD regulates the over-the-counter securities market, which includes securities firms and registered representatives who buy and sell over-the-counter-securities.")

12. Congress has vested the Financial Industry Regulatory Authority (FINRA, formerly the National Association of Securities Dealers (NASD)) and the New York Stock

Exchange (NYSE) with the power to promulgate rules that, once adopted by the SEC, have the force of law. *See McDaniel v. Wells Fargo Investments, LLC*, 717 F.3d 668 (9th Cir. 2013) (citing 15 U.S.C. § 78s(b)). Consequently, some Circuits have even held FINRA's regulatory power is so strong it is capable of preempting state law. *See Whistler Invs., Inc. v. Depository Trust & Clearing Corp.*, 539 F.3d 1159, 1168 (9th Cir.2008). *See also Wyeth v. Levine*, 555 U.S. 555, 557 (2009) ("agency regulation with the force of law can preempt conflicting state requirements").

V.

JEFFERIES'S CITED AUTHORITY IS UNAUTHORITATIVE

13. In its brief, Jefferies sharply criticizes Claimant's citation to the Second Circuit's opinion in *Bensadoun v. Jobe-Riat*, 316 F.3d 171 (2d Cir. 2003). Claimants cite *Bensadoun* for two general reasons. First, that the Second Circuit has "expressly rejected the notion that [the mandatory arbitration Rule] 'require[s] indicia of a direct customer relationship between the member and the customer.'" *Id.* at 176 (quoting *John Hancock Life Ins. Co. v. Wilson*, 254 F.3d 48, 59 (2d Cir. 2001)). Second, that application of FINRA's arbitration rule is to be broadly construed in favor of arbitration. *Id.* ("any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.").

14. The thrust of Jefferies argument is that other opinions, from various courts of appeals and other trial courts create a precedent, which narrows the plain language of FINRA's arbitration rule and FINRA's express definitions. Jefferies contends that even though the Rule expressly applies to "a" customer requesting arbitration, the opinions it cites to indicate the Court should construe the Rule to apply only to customers "of" Jefferies. Put differently, the parties are arguing whether the opinions Claimants cite (and the plain language of FINRA's arbitration

rule), or the opinions Jefferies cite, provide the weightier influence for the Court. The opinions Jefferies cites to have failed to account for one glaring factor, however:

15. The SEC and the Rule's drafters have also dealt directly with the issue and expressly rejected Jefferies's position. None of the opinions Jefferies cites have considered this rejection nor have they considered the vast body of Constitutional law which leaves such matters to the sound discretion of the rulemakers.

16. This fact alone obviates whatever precedential value Jeferies's cited opinions may have had. In fact, it makes apparent that the proper construction of FINRA's arbitration rule is the one adopted by the drafters, the SEC, and the Second Circuit.

VI.

JEFFERIES'S CITED AUTHORITY IS UNCONSITUTIONALLY VIOLATIVE OF THE SEC AND FINRA'S CONGRESSIONALLY DELEGATED AUTHORITY

17. The NASD, FINRA's predecessor, and also sitting in the same congressionally authorized role of a self-regulatory organization under the Securities Exchange Act of 1934, drafted FINRA's arbitration rule. Pursuant to guidelines under the Act, the SEC reviewed the draft arbitration rule. The SEC also published it for comment and firms in Jefferies's situation actually lobbied for a revision consistent with Jefferies's position in this case. The SEC and NASD considered it and expressly rejected it:

> Under Proposed Rule 12200, parties must arbitrate if "requested by the customer," and if the other requirements of the rule are satisfied. ***One commenter suggested inserting the words "of the member"*** after the word "customer" in the proposed rule text. This commenter asserted that this change would eliminate attempts by customers to demand arbitration of disputes against firms with which the customer does not have an account or other relationship.
>
> …

> In Amendment 5, ***NASD responded that adding the words "of the member" after the word "customer" would inappropriately narrow the scope of claims that are required to be arbitrated under the Customer Code.***
>
> …
>
> IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the [Securities Exchange] Act [of 1934], that the proposed rule changes as amended, be, and hereby are, approved.

SEC Release No. 34-55158, 72 Fed.Reg. 4573, 4579 & 4609 (Jan. 24, 2007) (emphasis added) (citation omitted). Just as the commenter referenced above, Jefferies wants the Court to add a requirement that the customer be a customer "of the member." The drafters clearly indicated the scope of arbitrability should extend beyond merely direct customer relationships. There can be no clearer indication of this than the Order of the SEC.

18. What is more, it is the SEC's congressionally delegated authority to promulgate and approve rules for the regulation of members such as Jefferies. *See* e.g., 15 U.S.C. § 78s ("Registration, responsibilities, and oversight of self-regulatory organizations"). *See also* paragraphs 10-12 above detailing this delegation. Where an agency of the executive branch exercises authority to resolve issues, the courts are loathe to impose their opinion in the place of the rule maker. In fact, it is an extremely deferential standard that has been recognized in too many Supreme Court opinions to count. Ranging from the U.S. Armed Forces and the President's power to enact rules impacting criminal penalties under the Uniform Code of Military Justice to the SEC, specifically. *See Loving v. United States*, 517 U.S. 748 (1996) ("[S]o too may Congress delegate authority to the President to define the aggravating factors that permit imposition of a statutory penalty"); *SEC v. Chenery Corp.*, 318 U.S. 80, 88 (1943) (distinguishing administrative orders of policy as those where "a judicial judgment cannot be made to do service for an administrative judgment…. an appellate court cannot intrude upon the

domain which Congress has exclusively entrusted to an administrative agency"). *See also CIA v. Sims*, 471 U.S. 159, 166 (1985) (striking down judicially created construction of definition narrower than plain meaning of statute because Congress vested CIA with "broad authority" to determine the issue.)

19. ***The opinions Jefferies cites are not authoritative because none of them considered the Constitutional issues raised by the SEC's rejection of the direct customer relationship requirement***. One strand of our separation of powers jurisprudence is the delegation doctrine. *Loving*, 517 U.S. at 758. "To burden Congress with all federal rulemaking would divert that branch from more pressing issues, and defeat the Framers' design of a workable National Government." *Id.*[1] *See also Lichter v. United States*, 334 U.S. 742, 778 (1948) (general rule is that "[a] constitutional power implies a power of delegation of authority under it sufficient to effect its purposes").

20. This jurisprudence does more than recognize the need for administrative rulemaking, however. It also recognizes that the agencies are due wide latitude in carrying out their congressional taskings. "Considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer." *Chevron U.S.A. Inc. v. Natura Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984). "Courts defer to agency interpretations in large part because Congress has chosen to delegate to the agency decision making in the field." *Amerada Hess Pipeline Corp. v. FERC*, 117 F.3d 596, 601 (D.C. Cir. 1997) (citing *Chevron*, 467 U.S. at 865-66).

21. The judiciary must decline to "substitute [its own] . . . discretion for that of the [agency]" because to do so would be "incompatible with the orderly functioning of the process

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[1] The Supreme Court also quoted Thomas Jefferson: "Nothing is so embarrassing nor so mischievous in a great assembly as the details of execution." Works of Thomas Jefferson 319 (P. Ford ed. 1904) (letter to E. Carrington, Aug. 4, 1787).

of judicial review. This is not to deprecate, but to vindicate . . . the administrative process, for the purpose of the rule is to avoid 'propel[ling] the court into the domain which Congress has set aside exclusively for the administrative agency.'" *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 169 (1962) (quoting *SEC v. Chenery Corp.*, 332 U.S. 194 (1947) (Chenery II).

22. Not only do agencies get judicial deference in construing statutes, they get extra deference in interpreting their own rules. Courts "[m]ust defer to [a Secretary's] interpretation [of her own regulation] unless it is plainly erroneous or inconsistent with the regulation." *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994). "It is well established 'that an agency's construction of its own regulations is entitled to substantial deference." *Martin v. Occupational Safety and Health Rev. Comm'n*, 499 U.S. 144, 150 (1991) (quoting *Lyng v. Payne*, 476 U.S. 926, 939 (1986)). Further, "[b]ecause applying an agency's regulation to complex or changing circumstances calls upon the agency's unique expertise and policymaking prerogatives, [federal courts] presume that the power authoritatively to interpret its own regulations is a component of the agency's delegated lawmaking powers." *Id.* at 151.

23. In their reluctance to supplant an agency's delegated rulemaking authority, the Courts have enumerated a test that governs and embodies this deferential policy. The Supreme Court created it in the case which it is named after, *Chevron*, supra. This doctrine is sometimes called "*Chevron* deference."

24. The *Chevron* test applies to administrative interpretations of statutes and regulations themselves. *See Christensen v. Harris County*, 529 U.S. 576, 587 (2000) (holding agency rules enacted through "notice-and-comment" rulemaking process are entitled to *Chevron* deference but distinguishing opinion letters as those which do not (they are "entitled to respect"). Determining a regulation's meaning requires application of the same principles that imbue

exercises in statutory construction." *Morales v. Sociedad Espanola De Auxilio Mutuo Y Beneficencia*, 524 F.3d 54 (1st Cir. 2008) (citing *Cumberland Coal Res., LP v. Fed. Mine Safety & Health Rev. Comm'n*, 515 F.3d 247, 254 (3d Cir. 2008)).

25. The *Chevron* test has two parts: Is the regulatory text clear? If not, is the regulation "based on a permissible construction of the statute" such that it is "a reasonable policy choice for the agency to make." *Chevron*, 467 U.S. at 843, 845. "If the meaning of the regulatory text is clear, the task is complete" and the Court must apply its plain meaning." *Exelon Generation Co., LLC v. Local 15, Intern. Broth. of Elec. Workers, AFL-CIO,* 676 F.3d 566 (7th Cir. 2012) (citing *Christensen*, 529 U.S. 576).

26. ***FINRA's arbitration rule is not ambiguous.*** First, FINRA's arbitration rule has defined the term "customer." Where a regulation expressly defines a term, the regulation is less likely to be ambiguous. Second, the SEC's order expressly approving the exclusion of the requirement Jefferies urges further demonstrates the clear meaning of customer and whether a direct relationship is required. Not only did the SEC reject Jefferies's contention, but it did so following a "notice-and-comment" process. This is the very process the Supreme Court has lauded as authoritative. *Christensen*, 529 U.S. at 587, supra.

27. ***Because FINRA's arbitration rule is not ambiguous, the Court must give effect to its plain meaning.*** The Constitutional opinions cited above demonstrate that clear regulations are to be given such effect. Unlike the opinions Jefferies cites, this Court is presented with this important Constitutional issue. The Court should therefore follow the deferential mandate of the Supreme Court and declare that the plain meaning of FINRA's arbitration rule governs.

28. This Court may also find some persuasive effect from a recent decision by FINRA. FINRA has also recently denied Jefferies's request for a stay urging the same position it

has taken before this Court. Presumably, FINRA interpreted its own arbitration rule and is therefore entitled to the great deference acknowledged by the Supreme Court. *See, e.g., Martin v. Occupational Safety and Health Rev. Comm'n*, 499 U.S. 144, supra. It is no overstatement to say FINRA is responsible for applying its rules in this case and it should. Congress has directed it to do so.

VII.

JEFFERIES'S OVERALL CONTENTION IS TO NARROW AND TOO NARROW

29. Context is crucial to construe and interpret regulations. Jefferies seeks to narrow the plain and express definition of customer under the FINRA Code of Arbitration and in doing so would have the court analyze the issue so narrowly as to miss the "forest through the trees."

30. Jefferies wholly ignores the business activities element of FINRA's arbitration rule focusing solely on the customer element. *See* FINRA Code of Arbitration Rule 12200 (arbitration only mandatory if a customer complains of a business activity of the FINRA member). In doing so, Jefferies makes a "reductio ad absurdum" argument.[2] Jefferies contends adopting Claimants' (and indeed the SEC and FINRA's) definition would lead to arbitrability for any and every investor because all are customers. *See* Jefferies Brief at 7. Consistent with its overall strategy, Jefferies attempts to focus the Court so narrowly on one definition, the definition of "customer," to remove ever important context from the Court's construction of the FINRA arbitration rule.

31. Such a result is not absurd because arbitration is only required when it deals with the business activities. Again, FINRA is the congressionally delegated authority to govern the business activities of its members. *See* Sections V-VI above for detailed discussion of

[2] Latin expression meaning "reducing to the absurd" used by logicians to described a form of proof that proves a dichotomous conclusion by assuming the negative and deriving an absurd result.

Constitutional approval of FINRA's role as regulator. ***It is therefore not absurd at all for FINRA and the SEC to require member firms to arbitrate complaints of their business activities no matter who the customer is or what other member firms may also be involved.*** To the contrary, it is soundly within FINRA's delegated Congressional authority and the SEC has expressly taken this position in approving the FINRA arbitration rule. *See* SEC Release No. 34-55158, 72 Fed.Reg. 4573, 4579 & 4609 (Jan. 24, 2007).

VIII.

EVEN IF JEFFERIES'S CITED AUTHORITY OPERATES AS JEFFERIES CONTENDS, ARBITRATION IS STILL MANDATORY BECAUSE CLAIMANTS MEET JEFFERIES'S ARGUED DEFINITION

32. Jefferies cites multiple opinions and argue they narrow the plain meaning of FINRA's arbitration rule. These cases hold, generally, that a customer is not only one as defined by the FINRA Code of Arbitration, but one that has purchased goods or services from the member.

33. Although this narrowing construction is incorrect and unconstitutional for the reasons above, Claimants did purchase services from Jefferies. Jefferies was the selling agent for PSI and was paid with proceeds when Claimants' purchased the securities at issue. As is typical, in this circumstance, Jefferies performed two services. It conducted an investigation (although an insufficient one) pursuant to its obligation under FINRA Rules and other Securities laws and it prepared the offering materials which Claimants relied on. When Claimants purchased the securities, a portion of the proceeds paid Jefferies, which it earned by performing the two services above. As a result, even though Claimants did not have accounts with Jefferies, they purchased Jefferies investigation and the disclosed information from Jefferies to make their investment decisions.

34. The anti-fraud and investor protection provisions are analogous to consumer protection statutes because they both serve the purpose of protecting persons from deceptive and unfair practices in the marketplace, whether the market be securities or used cars. In fact, many consumer protection statutes also apply to securities. This Court can consider the principles embodied in analogous consumer protection laws for persuasive effect. Consumer protection laws are largely a result of state law because they often deal with purely intrastate commerce. One good example is the Texas Deceptive Trade Practices Act. There, Texas has held that even when a consumer is technically a third party and doesn't pay the defendant directly, consumer standing still exists when the consumer was an intended beneficiary of the goods or services purchased. *E.g., Bohls v. Oakes*, 75 S.W.3d 473, 479 (Tex. App.—San Antonio 2002, pet. denied). The principal here is that the government has an interest in protecting consumers/customers from deceptive practices no matter who paid for them.

35. In terms of the issue before the Court, it would be to say as follows: ***If a FINRA member firm harms ANY customer through its business activities, FINRA has a legitimate interest in arbitrating those disputes and is well justified in requiring its member firms to do so.*** This is not absurd, nor is it irrational. To the contrary, it comports with the congressionally recognized need and interest in regulating the securities market first embodied in the Securities Exchange of 1934. *See* 15 U.S.C. 78b.

IX.

ALTHOUGH NO DIRECT CUSTOMER RELATIONSHIP IS REQUIRED, SUBSTANTIVE LAWS FORMALLY RECOGNIZE A DIRECT RELATIONSHIP

36. Although no direct customer-member relationship is required under FINRA's arbitration rule, one existed as a matter of law. Jefferies precludes from its analysis the possibility that a direct relationship can be established by any means other than having an account with a FINRA member or directly pay for goods and services.

37. No matter how much Jefferies may dispute its liability, it cannot dispute that it owed duties directly to the Claimants. The Court should consider the substantive laws the Claimants have demanded arbitration under. First, FINRA has direct guidance and published opinions establishing the duties a firm owes investors when preparing offering materials as Jefferies did in this case. *See* Claimants' Motion for Summary Judgment at Para. 28 (detailing duty of firms in preparing offering materials under FINRA rules and direct authority for same). What is even more telling is what specific rule FINRA has held to apply, FINRA's rule on communications to the public, NASD Rule 2210. ***FINRA has held and regulates its member firms on this duty to customers whether a customer of the member firm or not.***

38. The Texas Securities Act and Uniform Securities Act adopted by the various states recognizes an even broader duty Jefferies owed directly to the Claimants. Any link in the selling process owes a strict duty to any purchase of securities to avoid misrepresentations and omissions of material fact. *E.g., Brown v. Cole*, 155 Tex. 624, 291 S.W.2d 704, 708 (1956) (defining such persons broadly to include any who act as a "link in the chain of the selling process." Jefferies was a link in the selling process and so owed every Claimant this duty. ***Here again, as in the FINRA rule above, a direct legal duty relationship existed between a customer and FINRA member firm whether the customers were customers of the member firm or not.***

39. Recent amendments to the Securities Exchange Act of 1934 also adopt this same principle. *See* 15 U.S.C. 78i(f) ("any person" who violates the Section's antifraud provisions "shall be liable yo any person who shall purchase or sell any security"). Although Claimants do not sue under Section 78i, it shows that our United States Congress recognizes FINRA firms can owe a duty directly to persons who may not be customers of the firm.

X.

CONCLUSION AND PRAYER

40. In light of the foregoing, the opinions Jefferies cites, the Constitutional context U.S. Courts use when construing the rules of federal agencies, public policy interests in favor of arbitration, it is apparent the Court should defer to FINRA and apply the plain meaning of its arbitration rule.

41. Defendants pray this Court issue an order declaring and compelling Plaintiff to arbitrate Defendants' claims before the Financial Industry Regulatory Authority and grant any other and further relief to which Defendants may show themselves entitled.

Respectfully Submitted,

MCCATHERN, P.L.L.C.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was e-filed and served on this the 31st day of March, 2017 on the following counsel of record:

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